Notes

JURISDICTION OF REFEREES IN BANKRUPTCY IN PLENARY ACTIONS

MacDonald v. Plymouth County Trust Company [1] is significant in its extension of the jurisdiction of referees in bankruptcy. The trustee in bankruptcy filed a petition with the referee to set aside certain transfers of property by the bankrupt to a creditor as alleged preferences, voidable within the provisions of section 60(b) [2] of the Bankruptcy Act. The creditor appeared at the hearing, denying the allegations of the petition, and consenting that the issues be tried before the referee. The referee's decision being adverse, the creditor for the first time challenged the referee's jurisdiction, claiming that the issues thereby raised were properly determinable only in a plenary suit. The United States Supreme Court admitted the plenary character of the suit, and the existence of a privilege extended to the creditor by section 23(b) [3] to claim the benefits of the procedure in a plenary suit which are not available in the summary method of procedure employed by the referee. Nevertheless it was held that in view of the negative implications in previous Supreme Court decisions and the almost uniform practice of the lower federal courts, the privilege could be waived by consent [4] similar to that manifested by the creditor in this case.

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1. 286 U. S. 263 (1932).
2. Bankruptcy Act, § 60 (b), 11 U. S. C. § 96 (b) (1926).
3. Bankruptcy Act, § 23 (b), 11 U. S. C. § 46 (b) (1926).
4. Page v. Arkansas Natural Gas Corporation, 286 U. S. 269 (1932), decided on the same day, raises the question as to what type of conduct on the creditor's part will be deemed to constitute "consent" within the rule in the principal case. It was there held that the adverse claimant's voluntary presentation of its claim to the referee for adjudication constituted the required consent. Two lower federal courts had previously so held. *In re* Elletson Company, 174 Fed. 859 (N. D. W. Va. 1909); *In re* Carl Dernburg & Son, 5 F. (2d) 37 (C. C. A. 2d, 1924). Similarly, the adverse claimant's surrender of the property to the trustee (Wells & Company v. Sharp, 208 Fed. 393 (C. C. A. 8th, 1913)) or his failure to appeal from adverse orders entered by the referee (Breit v. Moore, 220 Fed. 97 (C. C. A. 9th, 1915)) or his general appearance and answer to the merits without objection (*In re* Steuer 104 Fed. 976 (D. Mass. 1900); *In re* Schwab, 258 Fed. 772 (E. D. N. Y. 1919)) or an express waiver made in open court (*In re* Carlile, 199 Fed. 612 (D. N. C. 1912)) have been held sufficient. On the other hand, the filing of a petition with the referee for the reclamation of property held by the bankrupt does not constitute consent as to matters having no relation to the claim which the adverse claimant presented (Daniel v. Guaranty Trust Company, 285 U. S. 154 (1932); *In re* Keystone Press, 203 Fed. 710 (D. Minn. 1913)); nor does the adverse claimant's appearance in obedience to the referee's peremptory orders and in defense of his claim, as long as he formally challenges the referee's jurisdiction before the final order is entered. Louisville Trust Company v. Comingor, 184 U. S.

A referee may determine in a summary proceeding all claims as to property held by the bankrupt[5] or by a third party on behalf of the bankrupt[6] at the time of the filing of the petition. But when the third party has obtained possession prior to the filing of the petition, and claims the right to hold such property as against the bankrupt or the trustee, the authority of the referee in summary proceedings is restricted to determining whether the claim has actual basis, or is merely colorable.[7] If the referee's decision is that the claim is without actual merit, he will regard the property as the property of the bankrupt subject to his summary jurisdiction.[8] But if his decision is that the claim is in good faith, or of questionable faith but probably real, he must, on objection of the creditor, remit the trustee to a plenary action.[9] Such plenary actions are limited by section 23(b)[10] to such "courts" where the bankrupt might have brought them had bankruptcy not been instituted "unless by consent of the proposed defendant", while suits for the recovery of property under sections 60(b),[11] 67(e)[12] and 70 (e)[13] are confined to any "court of bankruptcy . . . and any state court which would have had jurisdiction if bankruptcy had not intervened . . . . "

In deciding whether the referee may try the issues in a plenary suit when the creditor consents thereto, the lower federal courts have not been wholly in accord. A few have stated that the Act does not give the adverse claimant the power to consent to summary proceedings because the only provision relative to consent is section 23(b) which clearly refers to a consent to the tribunal and not to the mode of procedure.[14] A contrary interpretation, it is said, would only deprive the adverse claimant of the ordinary rights of a litigant, such as the right to a trial by jury. But it would seem that a consent to the tribunal, in this case the referee, necessarily involves a consent to the mode of procedure, since the only method that is employed by the referee is summary. Moreover,

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18 (1902); Taubel-Scott-Kitzmiller Company v. Fox, 264 U. S. 426 (1924); *cf.* First National Bank of Chicago v. Chicago Title & Trust Company, 198 U. S. 280 (1905).

5. White v. Schloerb, 178 U. S. 542 (1900); see Mueller v. Nugent, 184 U. S. 1, 13 (1902).

6. Board of Trade v. Johnson, 264 U. S. 1 (1924); Gamble v. Daniel, 39 F. (2d) 447 (C. C. A. 8th, 1930), appeal dismissed 281 U. S. 705 (1930).

7. See Harrison v. Chamberlin, 271 U. S. 191, 194 (1926); Mueller v. Nugent, *supra* note 5, at 15. For instances where the referee exceeded this authority, see *In re* Hayden, 172 Fed. 623 (D. Mass. 1908); *In re* Blum, 202 Fed. 883 (C. C. A. 7th, 1913); *In re* Vallozza, 225 Fed. 334 (D. N. J. 1915).

8. May v. Henderson, 268 U. S. 111 (1925); *In re* Holbrook Shoe & Leather Company, 165 Fed. 973 (D. Mont. 1908); *In re* Friedman, 161 Fed. 260 (C. C. A. 2d, 1908).

9. Weidhorn v. Levy, 253 U. S. 268 (1920); Louisville Trust Company v. Comingor; Daniel v. Guaranty Trust Company, both *supra* note 4; Note (1921) 30 YALE L. J. 414.

10. *Supra* note 3.

11. *Supra* note 2.

12. Bankruptcy Act, § 67 (e), 11 U. S. C. § 107 (e) (1926).

13. Bankruptcy Act, § 70 (e), 11 U. S. C. § 110 (e) (1926).

14. See *In re* Teschmacher & Mrazay, 127 Fed. 728, 731 (E. D. Pa. 1904); *cf. In re* Raphael, 192 Fed. 874 (C. C. A. 7th, 1911); Kelley v. Aarons, 238 Fed. 996 (S. D. Cal. 1917).

an adverse claimant would hardly be "deprived of a jury trial" when by his conduct he has consented to that deprivation. Other courts have literally interpreted the Act to mean that the referee has no authority to act except in "proceedings in bankruptcy", which it is settled do not include plenary actions, and that the term "courts" in section 23(b) does not include the referee, when he is acting on a matter of which he is not expressly given jurisdiction by the Act.[15] Since the referee does not have jurisdiction, irrespective of consent, these cases would deny him that jurisdiction even with consent, by reason of the doctrine often appearing in diversity of citizenship cases that a court otherwise without jurisdiction can not acquire jurisdicton by a mere agreement of parties to that effect.[16]

However, the great majority of the lower federal courts have upheld the referee's jurisdiction, without question, when the parties have consented,[17] following the implications of those Supreme Court decisions[18] which had previously held that the referee may not try the issues in a plenary suit "without consent". This doctrine to which the Supreme Court has given its sanction in the instant case, would seem the more desirable. On purely equitable considerations, conduct similar to that of the creditor in the principal case in not raising his objection until after referee had entered his final order, should be sufficient to estop him from denying the referee's jurisdiction.[19] Although he might have been entitled to have his claim tried to a jury after the issues had been regularly set up by complaint and answer in a plenary action, it would seem only fair to hold that by his consent this privilege was waived, like any other procedural privilege extended for the benefit of litigants.[20]

Moreover, admitting the general doctrine that consent cannot confer jurisdiction, there would seem to be no reason for its application to controversies arising under section 23(b). The term "courts" in section 23(b) may include

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15. *In re* Walsh Brothers, 163 Fed. 352 (N. D. Iowa 1908); see *In re* Ballou, 215 Fed. 810, 814 (E. D. Ky. 1914).

16. See Minnesota v. Northern Securities Company, 194 U. S. 48, 62 (1904); Thomas v. Board of Trustees, 195 U. S. 207, 211 (1904); Chicago, Burlington & Quincy R. R. Company v. Willard, 220 U. S. 413, 420 (1911); *cf.* Exporters v. Butterworth-Judson Company, 258 U. S. 365 (1922); Nixon v. Michaels, 38 F. (2d) 420 (C. C. A. 8th, 1930).

17. *In re* Hopkins, 229 Fed. 378 (C. C. A. 2d, 1916); *In re* Elletson Company; *In re* Carl Dernburg & Son; Wells & Company v. Sharp; Breit v. Moore; *In re* Steuer; *In re* Schwab; *In re* Carlile, all *supra* note 4; see Knapp & Spencer Company v. Drew, 160 Fed. 413, 416 (C. C. A. 8th, 1908); *In re* Hansen, 268 Fed. 904, 905 (S. D. Cal. 1919); Foster v. Manufacturers' Finance Company, 22 F. (2d) 609, 610 (C. C. A. 1st, 1927); American Finance Company v. Coppard, 45 F. (2d) 154, 155 (C. C. A. 5th, 1930).

18. See Louisville Trust Company v. Comingor, *supra* note 4, at 26; Taubel-Scott-Kitzmiller Company v. Fox, *supra* note 4, at 434; Harrison v. Chamberlin, *supra* note 7, at 193; Daniel v. Guaranty Trust Company, *supra* note 4, at 162.

19. *In re* Hopkins; Knapp & Spencer Company v. Drew, both *supra* note 17; *In re* Schwab; *In re* Steuer, both *supra* note 4. But *cf. In re* Walsh Brothers, *supra* note 15.

20. See Harrison v. Chamberlin, *supra* note 7, at 193; Taubel-Scott-Kitzmiller Company v. Fox, *supra* note 4, at 434; *cf.* Patton v. United States, 281 U. S. 276 (1930).

the referee, as section 1(7)[21] expressly so permits. Section 38(4),[22] defining the referee's jurisdiction, contemplates that referees may be invested with the powers of courts of bankruptcy except as to questions relating to compositions and discharges; and although the Supreme Court once stated that the referee is not to be regarded as a separate "court" within the meaning of section 23(b), but only an officer having no powers except those conferred by the reference,[23] that statement was limited to the particular situation wherein the creditor did not consent to the referee's jurisdiction. Furthermore, General Order XII (1)[24] provides that upon reference all proceedings are to be had before the referee, except such as are specifically required to be had before a Judge.[25] These provisions, under the liberal interpretation of the Supreme Court in the instant case, would seem to compel the conclusion that the term "courts" in section 23(b) and the term "courts of bankruptcy" in section 60(b), 67(e), and 70(e), include the referee so as to vest in him the power to try the issues in a plenary suit when the parties consent thereto.

THE FAMILY PARTNERSHIP AS A DEVICE FOR AVOIDING THE SURTAX

A TAXPAYER agreed to transfer one quarter of all he owned to each of his three daughters on receipt of her demand note for $400,000. Under the terms of the agreement the father retained complete control of the business and was to distribute the profits as he saw fit, but the daughters might examine the books and if they became dissatisfied with their father's management, he was to give back their notes and take over their interests. The Circuit Court of Appeals found that a partnership existed and held that the taxpayer was taxable only on his distributive share of the partnership profits.[1]

The principal case is an excellent example of the formation of a family partnership resulting in a reduction in the surtax which would otherwise be imposed on the income as a whole.[2] The courts have shown a marked tendency to recognize the existence of such a partnership [3] and their findings have over-

21. Bankruptcy Act, § 1 (7), 11 U. S. C. § 1 (7) (1926). Compare the report of the Committee on Legislation, submitted to the recent Conference of the National Association of Referees in Bankruptcy, which approves amending § 1 (7) of the Act to read, " 'court' shall mean *the judge or the referee* of the court of bankruptcy . . ." (1932) 7 JOUR. NAT'L ASS'N REFEREES IN BANKRUPTCY 3.

22. Bankruptcy Act, § 38 (4), 11 U. S. C. § 66 (4) (1926).

23. Weidhorn v. Levy, *supra* note 9.

24. General Order XII (1), 11 U. S. C. § 53 (1926).

25. As to the effect of a general reference on the referee's powers, see STAPLES, A SUIT IN BANKRUPTCY (1909) 102-109; and compare Kilgore v. Barr, 114 Va. 70, 75 S. E. 762 (1912).

1. Commissioner of Internal Revenue v. Olds, 60 F. (2d) 252 (C. C. A. 6th, 1932).

2. The REVENUE ACT OF 1932, § 182, provides that each member of a partnership shall be taxable only in his distributive share of the partnership income.

3. *Cf.* the refusal of the courts to permit a husband and wife to file separate tax returns under agreements for the assignment of future income. Lucas v. Earl, 281 U. S. 111 (1930); Burnet v. Leininger, 285 U. S. 136 (1932); Luce v. Burnet, 55 F. (2d) 751 (App. D. C. 1932).

ruled the opinion of the Commissioner of Internal Revenue in a large majority of cases.[4] But, it is difficult to discover any rationale as to the determining factors in the decisions involving family partnership since those elements which the courts have apparently used as criteria in finding a partnership, are likewise present when a partnership has been held not to exist.

Among these factors, the exercise of joint control over the business by the members might have been considered a critical point, but actually in many instances where the agreement constituted a partnership it expressly provided for control by a single member,[5] and in only one case did this result in the denial of the partnership.[6] Nor is the fact that the family members received their interests in return for a contribution of services or capital a conclusive index to the existence of a partnership; [7] and in many instances co-ownership resulting in a partnership was accomplished by means of a gift to the wife or children.[8] Likewise, the questions whether the names of all the parties were carried on the firm's books,[9] whether the business was conducted solely in the taxpayer's name,[10] and whether the community in general knew of the existence of the partnership [11] might be considered significant, but these factors bear no apparent relation to the courts' findings. Only two indicia appear consistently throughout the cases—the sharing of profits and the sharing of losses. Of these, the former is indecisive of the outcome because a provision for profit-

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4. In thirty-nine out of fifty-one cases where the Commissioner found that no partnership existed the Board of Tax Appeals held that the petitioner was taxable only on his share of the profits.

5. Cobb v. Commissioner, 9 B. T. A. 547 (1927); Kahn v. Commissioner, 14 B. T. A. 125 (1928); MacPherson v. Commissioner, 19 B. T. A. 651 (1930).

6. Tally v. Commissioner, 22 B. T. A. 712 (1931) (where petitioner was made "absolute dictator" of the management of the business).

7. In several instances no partnership was formed in spite of such contribution. Felton v. Commissioner, 18 B. T. A. 63 (1929) (services contributed); Coombs v. Commissioner, 20 B. T. A. 1021 (1930) (capital and services contributed); Buchanan v. Commissioner, 20 B. T. A. 210 (1930); S. M. 4277, IV—2 Cum. Bull. 58 (capital contributed). But, the additional credit which the wife's capital brought to the firm influenced the court to find a partnership in some instances. Pugh v. United States, 48 F. (2d) 600 (S. D. W. Va. 1931); Virden v. Commissioner, 6 B. T. A. 1123 (1927).

8. Phelps v. Commissioner, 13 B. T. A. 1248 (1928); Harrington v. Commissioner, 21 B. T. A. 260 (1930). In fifteen cases where a partnership was formed the family members received their interests as gifts.

9. Partnership formed: Peters v. Commissioner, 16 B. T. A. 895 (1929) (all names on books); Newell v. Commissioner, 17 B. T. A. 93 (1929) (only petitioner's name on books). Partnership not formed: Goldenberg v. Commissioner, 5 B. T. A. 213 (1926) (only petitioner's name on books); Robertson v. Commissioner, 20 B. T. A. 112 (1930) (all names on books).

10. Partnership formed: Virden v. Commissioner, *supra* note 7 (business done jointly); Gunderson v. Commissioner, 23 B. T. A. 45 (1931) (business done in petitioner's name). Partnership not formed: Felton v. Commissioner, *supra* note 7 (business done in petitioner's name).

11. Partnership formed: McKnight v. Commissioner, 13 B. T. A. 885 (1928) (knowledge in community); Appeal of Bartley, 4 B. T. A. 874 (1926) (not generally known). Partnership not formed: Hamerslag v. Commissioner, 15 B. T. A. 96 (1929) (not known to community).

sharing was evident in many agreements where no partnership was formed.[12] The latter, however, has appeared only in agreements which the courts have considered as forming a partnership,[13] and may therefore be considered as of greater weight than the other factors as a determinant. Perhaps the cause, and certainly the result, of this confusion is the exercise of a discretionary judgment by the courts on the facts of the individual case.

But even if it were possible to establish accurate criteria for the existence of a family partnership, realistically the change in status which the parties undergo in entering the agreement seems too slight to warrant a different method of taxation. In the first place, when the parties are members of the same family, it is difficult to discover any material diminution in the income of a husband or father who may, without invalidating the partnership, stipulate for the control of the distribution of the profits.[14] Furthermore, it is not likely that the taxpayer who admits members of his family to partnership actually relinquishes any control of the business, whether or not the agreement provides that he is to retain his previous authority. Finally, his wife or children incur little risk under a provision to share losses since they are generally without assets, although occasionally a wife may have a separate estate which partnership creditors might reach.[15]

Thus the family partnership permits an individual to reduce his income tax with little chance of detriment to himself or his "partners." In this he is aided by the courts' attitude that a partnership will not be invalid because its purpose is to evade the surtax.[16] However, one result is the unwarranted disparity in the operation of the income tax statutes upon the individuals who avail themselves of the device, and its operation upon those who do not. From the point of view of equitable tax administration, such inequality is clearly undesirable. The taxation of the family income as a unit has been suggested as a remedy for this lack of uniformity[17] and pending a change in the Revenue Act a more realistic determination of the existence of a family partnership might be had by vesting a greater discretion in the Commissioner of Internal Revenue.[18]

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12. Lidov v. Commissioner, 16 B. T. A. 1421 (1929) (no partnership as to children); Wickham v. Commissioner, 22 B. T. A. 1393 (1931); Kasch v. Commissioner, 25 B. T. A. 284 (1932).

13. Graham v. United States, 44 F. (2d) 566, (C. C. A. 7th, 1930); Goldenberg v. Commissioner, *supra* note 9; Robertson v. Commissioner, *supra* note 9.

14. Oakley v. Commissioner, 24 B. T. A. 1082 (1931); Commissioner v. Olds, *supra* note 1.

15. Pugh v. United States, *supra* note 7; Harrington v. Commissioner, *supra* note 8. Furthermore the formation of a partnership may deprive a husband of the possibility of transferring his assets to his wife's name in contemplation of bankruptcy.

16. Phelps v. Commissioner, *supra* note 8; see Mitchell v. Commissioner, 1 B. T. A. 143, 149 (1924).

17. Bruton, *The Taxation of Family Income* (1932) 41 YALE L. J. 1172.

18. It is significant that in several instances the Commissioner did not acquiesce in the finding of the Board of Tax Appeals that a partnership existed. Sunlin, 6 B. T. A. 1232 (1927), Non-acq. VII—1 Cum. Bull. 40; Reeb, 8 B. T. A. 759 (1927), Non-acq. X—1 Cum. Bull. 90; Wilson, 11 B. T. A. 963 (1928), Non-acq. VIII—2 Cum. Bull. 73; Biggs, 15 B. T. A. 1092 (1929), Non-acq. VIII—2 Cum. Bull. 59; Olds, 15 B. T. A. 560 (1929), Non-acq. IX—1 Cum. Bull 72 (the principal case).

POWER OF ASSIGNEE OF DEFAULTING PURCHASER AT JUDICIAL SALE TO COMPEL VENDOR TO PERFORM

A CORPORATION'S bid for land at a judicial sale was accepted by the referee, the corporation paying ten percent of the amount of its bid. On the day fixed for the closing of the sale, the vendee refused to complete its bid on the alleged ground that title to the premises was defective. After two years of litigation, the title was adjudged marketable, and the vendee directed to complete the sale.[1] Upon its failure to comply, the vendors obtained a court order for a resale which provided that the vendee be charged with any resulting deficiency.[2] Thereafter the vendee assigned the bid, and the assignees, in order to secure the benefit of an increase in the value of the land, made application for an order directing the referee to complete the original sale. The New York Court of Appeals, three judges dissenting, declared that the purchaser's default released the vendors from their duty to convey, and that in any event, relief could not be granted to the assignees who had assumed no obligation under the assignment.[3]

It is well established that the confirmation of a judicial sale vests an equitable estate in the purchaser, and impresses a trust upon the legal title retained by the vendor as security for the payment of the purchase price.[4] In such case a failure on the part of the purchaser to complete his bid empowers the vendor to enforce a lien upon the land for the balance of the purchase price,[5] under a court order for a resale. This is not considered a rescission of the contract,[6] and the land is resold as the property of the vendee who, while charged with the amount of a deficiency,[7] is entitled to a resulting surplus.[8] Consequently, it has been held that at any time prior to the actual resale, the defaulting purchaser may step in and complete the terms of the bid,[9] and that a previous

1. Bowen v. Poole, 255 N. Y. 615, 175 N. E. 337 (1931).

2. This order, while not acted upon, was never vacated or modified.

3. Bowen v. Horgan, 259 N. Y. 267, 181 N. E. 567 (1932).

4. *In re* Burr Mfg. & Supply Co., 217 Fed. 16 (C. C. A. 2d, 1914); Royal Insurance Co. v. Drury, 150 Md. 211, 132 Atl. 635 (1926); Matter of Superintendent of Banks, 207 N. Y. 11, 100 N. E. 428 (1912); Hurt v. Jones, 75 Va. 341 (1881). *Contra:* Garlington v. Copeland, 32 S. C. 57, 10 S. E. 616 (1890). See 1 POMEROY, EQUITY JURISPRUDENCE (4th ed. 1918) §§ 105, 368; 3 *id.* §§ 1046, 1161.

5. Lewis v. Hawkins, 90 U. S. 119 (1874); see Hurt v. Jones, *supra* note 4, at 346; Virginia Fire & Marine Ins. Co. v. Cottrell, 85 Va. 857, 861, 9 S. E. 132, 133 (1889); 1 POMEROY, *loc. cit. supra* note 2.

6. Ludwig's Estate, 74 Pa. Super. Ct. 250 (1920); Hurt v. Jones, *supra* note 4; Virginia Fire & Marine Ins. Co. v. Cottrell, *supra* note 5; see Banes v. Gordon, 9 Pa. 426, 427 (1848).

7. Camden v. Mayhew, 129 U. S. 73 (1889); Mariners Savings Bank v. Duca, 98 Conn. 147, 118 Atl. 820 (1922). See also *infra* note 8.

8. Aukam v. Zantzinger, 94 Md. 421, 51 Atl. 93 (1902); Hurt v. Jones, *supra* note 4; Virginia Fire & Marine Ins. Co. v. Cottrell, *supra* note 5; see Blakeley's Adm'x v. Hughes, 140 Ky. 174, 176, 130 S. W. 1067, 1068, (1910); 3 JONES, MORTGAGES (8th ed. 1928) § 2109. *Contra:* Chase v. Joiner, 88 Tenn. 761, 14 S. W. 331 (1890).

9. Robertson v. Skelton, 13 Beav. 91 (Eng. 1850); Denison v. Denison, 4 Chan. Cham. 37 (Ont. Can. 1872); *cf.* Billingslea v. Baldwin, 23 Md. 85 (1865) (where there had been a ratification nisi).

repudiation would constitute no bar to a later suit for specific performance.[10] The assignee of the bid would succeed by virtue of the assignment to the rights of the original vendee as equitable owner of the subject of the sale, and to the equitable remedies essential to their enforcement.[11] The view of the court that a lack of mutuality of remedy would bar the assignee from enforcing the contract[12] has been expressly repudiated in its own jurisdiction,[13] and has in general been so qualified by exceptions that it has lost its validity as a rule of law.[14] Moreover, the assignees by the very act of invoking the aid of equity assumed the duty of performance, and subjected themselves to whatever conditions the judgment entailed.[15]

The theory that an equitable estate is vested in the vendee under an executory contract for the sale of land originated as a rationalization of the remedy of specific performance in actions by a purchaser against a defaulting vendor.[16] A different situation is obviously presented where the purchaser after his own breach and an order for a resale finds it to his advantage to compel the completion of the original sale. Yet in the few cases in which this situation has arisen, courts have followed the logical implications of the concept of equitable title, and have permitted a recovery by the vendee.[17] The dissent in the instant case adopted this approach; it was argued that since an equitable title passed to the vendee, an order for a resale must be a direction to sell that title and an affirmance of the original contract of sale. The majority escaped this conclusion by omitting all reference to "equitable title." It declared instead that the purchaser's default had been final and complete, and that the order for a resale was merely an attempt on the part of the vendors to secure reimbursement for any consequent loss. This effort, the court concluded, the vendors should "in all fairness be permitted to abandon" if they saw fit. The force of this conclusion, however, is unfortunately impaired by the court's reliance on the theory that there was no mutuality of obligation between assignee and vendor, and its qualifying statement that the original purchaser might have been successful in the prosecution of the claim.

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10. *Cf.* Barton v. Molin, 225 Mich. 8, 195 N. W. 797 (1923) (the defaulting vendee recovered against the vendor on the ground that the vendee's equitable title was a property interest which could be released only by a written memorandum); noted in (1924) 33 YALE L. J. 665.

11. Lenman v. Jones, 222 U. S. 51 (1911); Roche v. Fairbanks, 254 Mass. 7, 149 N. E. 548 (1925); Epstein v. Gluckin, 233 N. Y. 490, 135 N. E. 861 (1922); noted in (1922) 22 COL. L. REV. 682; (1922) 36 HARV. L. REV. 229; (1923) 32 YALE L. J. 831; 5 POMEROY, *op. cit. supra* note 4, § 2273.

12. The statement of the requirement of mutuality of remedy, in FRY, SPECIFIC PERFORMANCE (1858) § 286, restated in *id.* (6th ed. 1921) § 460, led to its application in many cases.

13. Epstein v. Gluckin, *supra* note 11.

14. Lenman v. Jones, *supra* note 11; McVoy v. Baumann, 93 N. J. Eq. 360, 117 Atl. 717 (1922), *aff'd*, 93 N. J. Eq. 638, 117 Atl. 725 (1922); First National Bank v. Corporation Securities Co., 128 Minn. 341, 150 N. W. 1084 (1915). See also CONTRACTS RESTATEMENT (Proposed Final Draft No. 12, 1932) § 372; Cook, *The Present Status of the "Lack of Mutuality" Rule* (1927) 36 YALE L. J. 897.

15. Archer v. Archer, 155 N. Y. 415, 50 N. E. 55 (1898); Epstein v. Gluckin, *supra* note 11.

16. 1 POMEROY, *op. cit. supra* note 4, § 105.

17. *Supra*, notes 9 and 10.

TAXATION OF BUSINESS TRUSTS

THE problem of determining what trusts are, for purposes of federal taxation, business trusts or "associations," and hence taxable as corporations,[1] has perplexed the courts since *Hecht v. Malley*.[2] In that case the Supreme Court had before it the government's claim that three trusts were associations and so were subject to an excise tax levied upon corporations, joint stock companies and associations. The court held that these were business trusts or associations because their trustees were "associated together in much the same manner as directors in a corporation for the purpose of carrying on business enterprises," [3] this being true "independently of the large measure of control exercised by the beneficiaries." [4] The Board of Tax Appeals and the lower federal courts have followed the *Hecht* case in repudiating the earlier test of control; [5] but the double test of quasi-corporate organization and carrying on a business enterprise, which the Supreme Court set up in place of control, has not proved workable. Many trusts which issue shares to their beneficiaries and which engage actively in business, do not come within the *Hecht v. Malley* definition of an association because their trustees are not organized like a board of directors. These trusts have not been allowed to escape taxation at the higher rate imposed upon associations; but the attempts to reconcile the decisions taxing them as business trusts with the language of the *Hecht* case has resulted in some confusion as to the test upon which the courts determine a trust's classification. The actual decisions of the courts, however, are not as confused as a reading of their opinions would suggest.

Trusts carrying on industrial or commercial enterprises, as distinguished from real estate operations, have been held with some uniformity to be business trusts even if their organization bears no resemblance to that of corporations.

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1. Associations and joint stock companies are taxed as corporations. § 1111, REVENUE ACT OF 1932, PUBLIC LAWS No. 154 (72d Cong., 1932), approved June 6, 1932. Business trusts are included in this use of the word associations. Hecht v. Malley, 265 U. S. 144 (1924).

2. 265 U. S. 144 (1924).

3. *Id.* at 161.

4. *Ibid.*

5. This test had been used since Crocker v. Malley, 249 U. S. 223 (1919), the first case upon the question. Attempts have been made to distinguish this case from Hecht v. Malley, *supra* note 2, and to show that the court in the latter case did not necessarily repudiate control as a basis for classifying trusts for purposes of income taxation. Rottschaefer, *Massachusetts Trust Under Federal Tax Law* (1925) 25 COL. L. REV. 305; Rommel, *Tax Liability of Business Trusts* (1929) 7 N. I. T. M. 14. The attempted distinction has not been made by the courts, however; control is no longer considered to be a test. Burk-Waggoner Oil Association v. Hopkins, 269 U. S. 110 (1925); White v. Hornblower, 27 F. (2d) 777 (C. C. A. 1st, 1928); Little Four Oil & Gas Co. v. Lewellyn, 35 F. (2d) 149 (C. C. A. 3d, 1929); Trust No. 5833, Security-First National Bank v. Welch, 54 F. (2d) 323 (C. C. A. 9th, 1931). U. S. TREAS. REG. 69, Art. 1504 (1927), in which the beneficiaries' control over the trustees is made one of the tests of whether or not a trust is taxable as an association, has been held incompatible with the decisions of the courts, since control is no longer considered to be the test. Fisk v. United States, 60 F. (2d) 665, 667 (D. Mass. 1932).

Thus, trusts manufacturing vulcanizers,[6] or engaged in oil production,[7] or owning and managing an apartment house,[8] or a cafeteria[9] or a theater,[10] or conducting an investment business,[11] have been held to be business trusts. The only trusts formed for similar activity that have not been taxed as associations have been those formed only for liquidation of an insolvent or dissolved concern,[12] or which have themselves sold out and dissolved before actually beginning the business activities for which they were formed.[13] With these exceptions, however, the conclusion seems justified that any trust engaged in industrial or commercial enterprises[14] will be called a business trust and will be taxed as an association, no matter how it is organized.

The classification of real estate trusts is not so readily predictable. Difficulty is encountered in making the uncertain distinction between merely holding property for the collection of income, and "carrying on a business." A trust

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6. Anderson Steam Vulcanizer Co. v. Commissioner, 6 B. T. A. 737 (1927). The trustees in this case did organize themselves in much the same manner as a corporation's board of directors.

7. Little Four Oil & Gas Co. v. Lewellyn, *supra* note 5; E. A. Landreth Co. v. Commissioner, 11 B. T. A. 1 (1928). In the first of these cases the four trustees carried on the trust's business as individuals, not as a board of directors. In the Landreth case a single trustee had complete charge of the business, yet the Board held that the trust was conducting its business under the form of a corporation. In Royal Syndicate v. Commissioner, 20 B. T. A. 255 (1930), a trust engaging in the production of the oil was held not to be an association. But although this business was called a trust, it seems really to have been a partnership. A small group of persons were concerned in the venture, with title to the well held in the name of one of them as "trustee"; no shares were issued, and all the members participated in the trust's management, discussing its affairs and making decisions when they met casually upon the street. The case cited by the Board as authority for its decision was a partnership case. Myers, Long & Co. v. Commissioner, 14 B. T. A. 460 (1928).

8. J. W. Pritchett v. Commissioner, 17 B. T. A. 1056 (1929). The three trustees here managed the apartment house as individuals, not as a group or board; they elected no officers and held no meetings.

9. Mary L. Dutton v. Commissioner, 18 B. T. A. 1151 (1930). This trust did have quasi-corporate organization.

10. Rochester Theatre Trust Estate v. Commissioner, 16 B. T. A. 1275 (1929). There were two trustees of this trust; one was a bank, and the other an individual who received $100 a year for his services.

11. Tulsa Mortgage Investment Co. v. Commissioner, 21 B. T. A. 735 (1930). This trust did have quasi-corporate organization.

12. White v. Hornblower, *supra* note 5; Gonzolus Creek Oil Co. v. Commissioner, 12 B. T. A. 310 (1928).

13. Mason v. United States, 27 F. (2d) 1013 (D. Mass. 1928); Lucas v. Extension Oil Co., 47 F. (2d) 65 (C. C. A. 5th, 1931); Appeal of Durfee Mineral Co., 7 B. T. A. 231 (1927).

14. If a trust is not carrying on business, it will not be taxed as an association. Thus where individuals loaning money to an oil enterprise formed a trust to receive and distribute to themselves the profits from the enterprise with which their loan was repaid, the trust was held not to be an association. Jackson-Wermich Trust v. Commissioner, 24 B. T. A. 150 (1931).

engaged only in holding property will not be taxed as an association;[15] but a trust will probably be "doing business' if it sells some and acquires other real estate,[16] or if it invests in improvements on property already held.[17] Ownership of an office building is not "carrying on a business" when active management of the property is delegated to agents.[18] Subdivision and development projects are of course business enterprises.[19] A further difficulty particularly apparent in the classification of real estate trusts arises from the vagueness of the term "liquidation." A trust whose only purpose is the immediate disposition of property, and whose activities are directed solely to that end, is liquidating"[20] in the sense in which the word is ordinarily used. But in some cases trusts engaging in what might otherwise be considered a real estate business have escaped taxation as associations by insisting that, since their primary purpose is sale of their property, they are only liquidating and not carrying on a business. Thus, trusts that have been "liquidating" property holdings for more than half a century have nevertheless been held not to have engaged in business;[21] and in one case a trust conducting a large development and subdivision project escaped taxation as an association by persuading the Board of Tax Appeals that it was only liquidating the property.[22] And although the courts are reluctant to hold that ancestral trusts are associations,[23] ordinarily finding that they are merely holding property or are liquidating it even when

15. Gardiner v. United States, 49 F. (2d) 992 (C. C. A. 1st, 1931); Lansdowne Realty Trust v. Commissioner, 50 F. (2d) 56 (C. C. A. 1st, 1931); Fisk v. United States, *supra* note 5; Terminal Properties Co. v. Commissioner, 19 B. T. A. 584 (1930). U. S. TREAS. REG. 74, Art. 1314 (1929).

16. C. W. Cowell Co. v Commissioner, 21 B. T. A. 1274 (1931); *cf.* Willis v. Commissioner, 58 F. (2d) 121 (C. C. A. 9th, 1932). And the activities of the trusts in the Hecht case appear to have been of this sort. The trust in the Cowell case did have quasi-corporate organization; but in the Willis case the three trustees were not required to, and did not, hold meetings, elect officers, or otherwise conduct themselves as a board of directors.

17. Willis v. Commissioner, *supra* note 16.

18. Tyson v. Commissioner, 54 F. (2d) 29 (C. C. A. 7th, 1931) (Zenith Real Estate Trust). *Contra:* Tyson v. Commissioner, 20 B. T. A. 597 (1930) (City Real Estate Trust); and see Hecht v. Malley, *supra* note 2, at 162.

19. Trust No. 5833, Security-First National Bank v. Welch, *supra* note 5; Sloan v. Commissioner, 24 B. T. A. 61 (1931). *Contra:* Lucian S. Moore, Jr. v. Commissioner, 21 B. T. A. 1362 (1931). In the first of these cases an elaborate indenture provided the appearance of quasi-corporate organization; but in the Sloan case the two trustees carried on the business as individuals, not as a board of directors.

20. Commissioner v. Atherton, 50 F. (2d) 740 (C. C. A. 9th, 1931).

21. Fisk v. United States, *supra* note 5; Dauphin Deposit Trust Co. v. Commissioner, 21 B. T. A. 1214 (1931).

22. Lucian S. Moore, Jr. v. Commissioner, *supra* note 19.

23. Such trusts were held not to be associations in Blair v. Wilson Syndicate Trust, 39 F. (2d) 43 (C. C. A. 5th, 1930); Gardiner v. United States, *supra* note 15; Fisk v. United States, *supra* note 5; Wilson Trust v. Commissioner, 20 B. T. A. 549 (1930); Dauphin Deposit Trust Co. v. Commissioner, *supra* note 21; Morriss Realty Co. v. Commissioner, 23 B. T. A. 1076 (1931). But *cf.* Willis v. Commissioner, and C. W. Cowell Co. v. Commissioner, both *supra* note 16.

they engage in business activities,[24] in one case the heirs of an undivided estate neglected to provide in their indenture that the purpose of the trust was liquidation and were held to have formed a business trust.[25]

In the recent case of *McCormick v. Commissioner*,[26] the Board of Tax Appeals was called upon to classify a real estate trust whose only "activity" was holding title to the Chicago Stock Exchange Building;[27] the trustees did not, as such, supervise the agents who managed the property, or collect the income from it.[28] The Board's decision that this trust was not an association seems consistent with earlier cases.[29]

The Board of Tax Appeals in seeking to apply the double test of *Hecht v. Malley* has at times been forced to find quasi-corporate organization where none in fact existed.[30] But though they have thus attempted to give weight to both the elements specified by the Supreme Court, their decisions seem to have been based primarily upon the activities in which the trustees engaged. The Federal courts, in cases appealed from the Board's decision, have disregarded the first part of the *Hecht* case test[31] and have declared that "the crucial test must be found in what the trustees actually do."[32] This test has the merit of simplicity, and it may be justified upon the ground that all trusts engaging in business enterprises, no matter how organized, have the important corporate advantages of concentration of control and a fixed capital divided into freely transferable shares.

Jurisdiction Over Pledged Assets In Receivership Administration

Receivers having been appointed by a federal district court in Illinois for the insolvent Insull Utility Investments Corporation, a large part of the assets of this corporation were found to be in the form of capital stock of other Illinois

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24. Thus in the Dauphin Deposit Trust case, *supra* note 21, the trust owned a hotel and had it reconstructed into an office building; and in the Morriss Realty Co. case, *supra* note 23, the trust was engaged in subdividing some of the property it owned, and constructing houses on the lots. Yet these trusts were said not to be associations. But *cf.* Willis v. Commissioner, *supra* note 16.

25. C. W. Cowell Co. v. Commissioner, *supra* note 16.

26. 26 B. T. A. —, decided Oct. 11, 1932.

27. The three sons of Cyrus H. McCormick, desiring a large loan for the McCormick Harvester Machine Co. without the publicity attendant upon a mortgage, transferred this building (which they already owned) to themselves as trustees, and issued shares of beneficial interest to the Scotch bank from which they secured the money. The loan was repaid in 1912.

28. Since repayment of the loan, title has remained in the trust; but the building has, throughout the life of the trust, been managed and the income from it handled by the office responsible for all the McCormicks' investments.

29. On somewhat similar facts trusts were held not to be associations in Lansdowne Realty Trust v. Commissioner, *supra* note 15, and in Wilson Trust v. Commissioner, *supra* note 23; and *cf.* Tyson v. Commissioner (Zenith Real Estate Trust), *supra* note 18.

30. See cases *supra* notes 7, 8, 10, 16, and 19.

31. The federal courts have not discussed the quasi-corporate organization, or the lack of such organization, in any case that has come before them.

32. Gardiner v. United States, *supra* note 15, at 996.

corporations pledged with banks in New York as collateral for loans. Upon representation immediately upon the appointment of the receivers that the New York banks were about to sell this collateral stock, apparently in accordance with the terms of its pledge, the court issued an order temporarily enjoining such sale pending investigation to obtain adequate knowledge as to the rights of the parties in interest. In response to a motion by the banks to dissolve the injunction, the court reaffirmed its jurisdiction and denied the motion.[1] Appeal was then taken to the Circuit Court of Appeals, which reversed the lower court and ordered the injunction dissolved, declaring the "situs" of the pledged stock to be, for purposes of this suit, in New York.[2]

While the Circuit Court of Appeals places its denial of validity of the injunctive order squarely on the ground that the situs of the pledged stock is in New York, it nevertheless declares itself to be persuasively influenced by the recent case, *In re Hudson River Navigation Corporation*.[3] This case, decided by the Circuit Court of Appeals of the Second Circuit, and following two earlier cases of the same court,[4] declared a bankruptcy court to be without jurisdiction to restrain the sale by a pledgee, in accordance with the terms of the pledge, of collateral pledged by the bankrupt more than four months prior to the adjudication. Here no question of territorial jurisdiction is raised; and that question is indeed entirely distinct from the power of the court to enjoin the sale of pledged securities, in either equity or bankruptcy proceedings. If, in the *Insull* case, the Illinois court does not have jurisdiction of the res pledged (as the higher court holds), it is obviously superfluous to discuss the matter of enjoining its sale by the pledgee. The comments of the court on that subject must therefore be taken to indicate that even though jurisdiction of the res pledged were admitted, it would still be persuaded to deny the injunction against its sale through fear of disturbing the security of transactions of that sort by preventing the pledgee from choosing his own time to sell. That such considerations must weigh heavily with the court asked to enjoin such a sale is obvious. In exercising its discretion the court must consider the probability of the loss by the pledgee of any of the value of his security as well as the expected beneficial effects to the estate as a whole, and other creditors, to be gained by an injunction.[5] To deny that a bankruptcy or equity court has the power to direct the liquidation of assets according to its own discretion, however, regardless of subsisting liens, is to run counter to the apparently unanimous authority of federal decisions outside the Second Circuit.[6] The Supreme

1. Cherry v. Insull Utility Investments, 58 F. (2d) 1022 (N. D. Ill. 1932). This case is noted on another point, *infra* p. 276.

2. Guaranty Trust Co. v. Fentress; Guaranty Trust Co. v. McNally (heard together), U. S. Daily, Oct. 31, 1932, at 1574 (C. C. A. 7th, 1932).

3. 57 F. (2d) 175 (C. C. A. 2d, 1932).

4. *In re* Mertens, 144 Fed. 818 (C. C. A. 2d, 1906); *In re* Mayer, 157 Fed. 836 (C. C. A. 2d, 1907).

5. This is admitted and discussed in the opinion of *In re* Hudson River Navigation Corporation, *supra* note 3.

6. Isaacs v. Hobbs Tie and Timber Co., 282 U. S. 734 (1931); Straton v. New, 283 U. S. 318 (1931); *In re* Utt, 105 Fed. 754 (C. C. A. 7th, 1901); *In re* Williams, 156 Fed. 934 (C. C. A. 9th, 1907); *In re* Waggoner, 206 Fed. 789 (N. D. Tex. 1913); Mississippi Valley Trust Co. v. Ry. Steel Spring Co., 258 Fed. 346 (C. C. A. 8th, 1919); *In re* Purkett, Douglas and Co., 50 F. (2d) 435 (S. D. Cal. 1931); see Jerome v. McCarter, 94 U. S. 734 (1876); Matter

Court in a very recent case, after holding that valid liens subsist in bankruptcy proceedings concluded that nevertheless: "It is solely within the power of a court of bankruptcy to ascertain their validity and amount *and to decree the method of their liquidation.*" [7] Furthermore, sales by pledgees or other lienors of property of various sorts, including intangibles, in the hands of bankruptcy or equity receivers have been declared void repeatedly, for want of leave of the court appointing the receiver,[8] and state courts have been denied jurisdiction to enforce liens against property in the hands of a receiver of a federal court.[9] In general, it may be said that property in the hands of a receiver appointed by a court may not be interfered with in order to carry out private agreements, contracts, or trusts; [10] and furthermore, that a court which is administering property already in its hands through a receivership may properly draw to itself all disputes as to liens or other rights on or pertaining to such property.[11]

If, therefore, the Illinois court had jurisdiction of the stock pledged with the New York banks, it would seem by the overwhelming weight of authority that it had the power to enjoin its sale; and that its action in that regard could be attacked only on the ground of abuse of discretion—which is nowhere suggested. It may be noted that even in the *Hudson River Navigation Corporation* case the power of the court to enjoin the sale of the pledged securities at certain stages of the bankruptcy proceedings is admitted; and that the denial of the injunction was not necessarily a denial of the power to enjoin, under the circumstances of the case, reducing the words of the court denying such jurisdiction to *obiter dicta.*

Perhaps the strongest argument in favor of the jurisdiction of a court to exercise full control over the liquidation of assets in the hands of its receivers, regardless of liens or pledges, is also the strongest argument for extending

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of Higgins, 179 Fed. 490 (C. C. A. 8th, 1910); Reihle v. Margolies, 279 U. S. 218, 223 (1929). In the case last cited the court states: "The appointment of a receiver of a debtor's property by a federal court confers upon it, regardless of citizenship, and of the amount in controversy, federal jurisdiction to decide all questions incident to the preservation, collection, and distribution of assets." But see Risk v. Kansas Trust and Banking Co., 58 Fed. 45 (C. C. D. Kans. 1893); International Banking Corporation v. Lynch, 269 Fed. 242 (C. C. A. 9th, 1920).

7. Isaacs v. Hobbs Tie and Timber Co., *supra* note 6, at 738. (Italics supplied).

8. Wiswall v. Sampson, 14 How. 52 (U. S. 1852); Hitz v. Jenks, 185 U. S. 155 (1902); *In re* Waggoner, *supra* note 6.

9. *In re* Tyler, 149 U. S. 164 (1893); Isaacs v. Hobbs Tie and Timber Co., *supra* note 6; Toledo Ry. v. Trust Co., 95 Fed. 497 (C. C. A. 6th, 1899). But see Straton v. New, *supra* note 6, holding that execution of a judgment lien on a judgment recovered more than four months before the institution of bankruptcy proceedings may not be enjoined by the bankruptcy court.

10. See Wiswall v. Sampson, *supra* note 8, at 66; *In re* Tyler, *supra* note 9, at 181; Hitz v. Jenks, *supra* note 8; Mississippi Valley Trust Co. v. Ry. Steel Spring Co., *supra* note 6; HIGH, RECEIVERS (3d ed. 1894) § 141.

11. Farmers Loan and Trust Co. v. Lake Street Elevated Rr. Co., 177 U. S. 51 (1900); Wabash Ry. Co. v. Adelbert College, 208 U. S. 38 (1908); Central Trust Co. v. South Atlantic & O. Rr. Co., 57 Fed. 3 (C. C. W. D. Va. 1893); Toledo Ry. v. Trust Co., *supra* note 9; see Mississippi Valley Trust Co. v. Ry. Steel Spring Co., *supra* note 6.

its jurisdiction to intangible assets of the debtor whose tangible evidence, in the form of notes, bonds, or stock certificates, are not physically present within the state—namely, the great advantages to be gained in direct cost, efficiency, and consistency, from the unitary administration of such an estate, for the benefit of all its creditors. In a case of doubt as to jurisdiction, which the court admits was present in the *Insull* case, it would appear that this argument should be highly persuasive.

Situs of Corporate Stock in Receivership Administration

On May 15, 1932, in response to a creditor's bill, receivers were appointed for the extensive holdings of the Insull Utility Investments Corporation by a federal district court in Illinois, the state of its corporate domicile. Many millions of dollars of the assets of this corporation were found to be in the form of capital stock of prosperous operating utilities corporations, also of Illinois, but pledged with banks of New York as collateral for loans now exceeding the value of the stock. Upon representation by the receivers, immediately upon their appointment, that the New York banks were about to sell this collateral stock at public auction the following morning, apparently in accordance with the terms of its pledge, the federal court in Illinois issued an order temporarily enjoining such sale pending investigation to obtain adequate knowledge as to the rights of the parties in interest. The banks appeared specially to deny the jurisdiction of the court and moved that the restraining order be dissolved. This motion was denied on the ground that the res, the collateral whose sale was enjoined, was capital stock of Illinois corporations, owned by another Illinois corporation whose assets had, through the receivership, passed into the hands of the court.[1] The Circuit Court of Appeals thought otherwise, however, and, upon appeal, ordered the injunction dissolved for want of jurisdiction, the "situs" of the stock for purposes of this suit being, according to its view, in New York; the higher court admitting, nevertheless, that its decision was not free from doubt.[2]

It must be clear that the attributing of "situs", in its dictionary sense of physical location, to capital stock of a corporation is pure fiction.[3] The stock itself, being intangible, can have no geographical location. It is an aggregate of relations subsisting between the corporation and a second party, who, by virtue of these relations, is said to own the stock. This relation is evidenced by tangible stock certificates, which must not be confused with the stock itself.[4]

1. Cherry v. Insull Utility Investments, 58 F.(2d) 1022 (N. D. Ill. 1932). This case is noted on another point, *supra* p. 273.

2. Guaranty Trust Co. v. Fentress; Guaranty Trust Co. v. McNally (heard together), U. S. Daily, Oct. 31, 1932, at 1574 (C. C. A. 7th, 1932).

3. See Farmers Loan and Trust Co. v. Minnesota, 280 U. S. 204 (1930); Safe Deposit and Trust Co. of Baltimore v. Commonwealth of Virginia, 280 U. S. 83, 98 (1929) (Holmes' dissenting opinion); Pomerance, *The Situs of Stock* (1931) 17 Corn. L. Q. 43.

4. Winslow v. Fletcher, 53 Conn. 390, 4 Atl. 250 (1885); Smith v. Downey, 8 Ind. App. 179, 34 N. E. 823, 35 N. E. 568 (1893); Armour Brothers Banking Co. v. St. Louis National Bank, 113 Mo. 12, 20 S. W. 690 (1892); Plimpton v. Bigelow, 93 N. Y. 592 (1883); Moore v. Gennett, 2 Tenn. Ch. 375 (1875); Young v. South Tredegar Iron Co., 85 Tenn. 189, 2 S. W. 202 (1886); see Farmers Loan and Trust Co. v. Minnesota, *supra* note 3.

It is true that the Uniform Stock Transfer Act confers upon the stock certificate a high degree of negotiability in and of itself.[5] The purpose and effect of this negotiability is, however, merely to facilitate the transfer from one party to another in commercial transactions of the obligations and liabilities of the corporation to the owner of the stock, without liability of a subsequent owner to special defenses or equities in favor of the corporation which might formerly have existed. This negotiability of the stock certificate does not purport to change the stock-ownership relation, or to assimilate the stock itself into the certificate which represents it.[6]

It would seem reasonable that in order to entertain a suit concerning corporate stock a court should have jurisdiction of at least one of the parties to the relation—the corporation, or the owner of the stock; and this view has often been announced as the law.[7] For purposes of determining ownership of stock, jurisdiction of the corporation itself has been held to suffice, regardless of the presence of either the alleged owner or the stock certificates involved.[8] For purposes of taxation of the stock as property of its owner, the principle *mobilia sequuntur personam* has been held to govern, requiring jurisdiction of the owner.[9] The Supreme Court has expressly overruled its former position to the contrary, and denied such taxing power to the state having personal jurisdiction of the corporation, or of the certificates, but not of the owner of the stock.[10]

The necessity of personal jurisdiction of either of the parties to the stock-ownership relationship, however, has often been dispensed with where the stock certificates were physically present within the jurisdiction.[11] In such cases

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5. 6 U. L. A. (Stock Transfer Act) § 5.

6. See Pomerance, *op. cit. supra* note 3. The Uniform Stock Transfer Act consistently distinguishes between the certificates and the "the shares represented thereby". See 6 U. L. A. § 21.

7. Plimpton v. Bigelow, *supra* note 4; see Booth v. Clark, 17 How. 322 (U. S. 1854); Chase v. Wetzlar, 225 U. S. 79 (1912).

8. Jellenik v. Huron Copper Mining Co., 177 U. S. 1 (1900); Harvey v. Harvey, 290 Fed. 653 (C. C. A. 7th, 1923) (District Judge Lindley, who enjoined the New York banks from selling the pledged securities in the Insull case, speaks for the Circuit Court of Appeals of the Seventh Circuit, enjoining in this case also an absent defendant from disposing of stock whose ownership it was the purpose of the suit to determine.) Young v. South Tredegar Iron Co., *supra* note 4 (even where the incorporation was in another state, but the chief office and place of business of the corporation in the state where the suit is brought).

9. Safe Deposit and Trust Co. of Baltimore v. Commonwealth of Virginia, *supra* note 3; Farmers Loan and Trust Co. v. Minnesota, *supra* note 3 (a full exposition of the present legal theory); Baldwin v. Missouri, 281 U. S. 586 (1930); Beidler v. South Carolina Tax Commission, 282 U. S. 1 (1930); First National Bank v. Maine, 284 U. S. 312 (1932).

10. Blackstone v. Miller, 188 U. S. 189 (1903), holding that bank deposits in New York, property of a decedent domiciled in Illinois, were subject to inheritance tax in New York as well as in Illinois, was expressly overruled by Farmers Loan and Trust Co. v. Minnesota, *supra* note 3, which latter case has been followed by the subsequent cases cited in note 9, *supra*, all of which have been decided within the past two years.

11. Disconto-Gesellschaft v. United States Steel Co., 267 U. S. 22 (1925); Merritt v. American Steel Barge Co., 79 Fed. 228 (C. C. A. 8th, 1897); Blake

the certificates themselves have been accounted as property giving the court *in rem* jurisdiction to enforce a claim against its owner to the extent of the value of the stock itself.[12] The Supreme Court has held that ownership of the paper must be determined according to the law of the place where it is located;[13] and it has gone so far as to suggest that the exercise by a state of its power to ignore in the transfer of ownership of the paper the transfer in ownership of the stock would place such state beyond the pale of civilization.[14] On the other hand, in accordance with the principle already stated, it is well settled that a state may not impose an inheritance tax on stock owned by a non-resident decedent simply because the certificates are physically within the state.[15] And in a case of dispute as to the decedent's domicile, where one state, having possession of stock certificates of a foreign corporation, has taken probate jurisdiction and awarded the stock in accordance with its laws of succession, the Supreme Court has approved the subsequent award by the foreign state of the same stock, in accordance with its laws, to a different heir.[16] Here the second state exercised its power to ignore the award of the certificates by the first state, and ordered the corporation which it had chartered to cancel such certificates and issue new ones to the heir which it had designated—all, apparently, without placing itself beyond the pale of civilization. This case, however, does not hold further than that, as between the state of incorporation and the state in which stock certificates are located, in a case of disputed probate jurisdiction, the state of incorporation will prevail as to the true ownership of the stock in inheritance. This is entirely in accord with the disputed ownership cases already mentioned.[17]

Although, in spite of the cases last mentioned, the physical presence of stock certificates in a state has often been taken to confer jurisdiction for purposes of attachment to enforce liens against the stock,[18] no cases have arisen, apparently, prior to the *Insull* case which declare the physical possession of the certificates within the territorial jurisdiction of the court to be essential to maintaining a suit where both the issuing corporation and the owner of the stock—or indeed either of them—are within such jurisdiction.[19] While the

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v. Foreman Brothers Banking Co., 218 Fed. 264 (N. D. Ill. 1914); Puget Sound National Bank v. Mather, 60 Minn. 362, 62 N. W. 396 (1895); Simpson v. Jersey City Constructing Co., 165 N. Y. 193, 58 N. E. 896 (1900).

12. 36 STAT. 1102 (1911), 28 U. S. C. § 118 (1926). See cases cited *supra* note 11.

13. Disconto-Gesellschaft v. United States Steel Co., *supra* note 11.

14. In the Disconto-Gesellschaft case Justice Holmes, speaking for the court, after noting that the United States had the power to refuse to recognize title acquired by the Public Trustee in England to stock in an American corporation through the seizure of stock certificates in the hands of enemies, according to the law of England, added "But it (the United States) prefers to consider itself civilized, and to act accordingly". Disconto-Gesellschaft v. United States Steel Co., *supra* note 11, at 28.

15. *Supra* note 9.

16. Baker v. Baker, Eccles and Co., 242 U. S. 394 (1917).

17. *Supra* note 8.

18. *Supra* note 11. *Contra:* Pinney v. Nevills, 86 Fed. 97 (C. C. D. Mass. 1898); Winslow v. Fletcher; Smith v. Downey; Plimpton v. Bigelow, all *supra* note 4. See other cases cited in same note.

19. But see Gilmore v. Robillard, 44 F. (2d) 295 (C. C. A. 9th, 1930).

higher court is without doubt correct in pointing out that situs for jurisdictional purposes must be considered in regard to the particular situation in which it becomes material [20] — destroying the significance of a recent taxation case cited by the district court as controlling [21] — nothing of a jurisdictional nature is indicated in the present situation which, against the background of former cases, should immunize the stock of Illinois corporations, owned by an Illinois corporation in receivership, from the control of the Illinois court.[22]

Power of Senior Circuit Judge to Hold District Court — The Interborough Receivership

Pursuant to § 18 of the Judicial Code,[1] Senior Circuit Judge Manton found that the public interest required the designation of himself to hold a district court for the Southern District of New York. Under the standing order for the distribution of business in that district, a certain district judge had been assigned to hear applications for the appointment of receivers in equity causes. Judge Manton formally announced his disagreement with such division of business and, invoking Section 23 of the Judicial Code,[2] appealed to himself in his capacity as senior circuit judge to resolve the dispute. Accordingly, Judge Manton ordered that applications for the appointment of receivers be thenceforward made before himself as district judge, in addition to the regularly assigned judge. The following day, upon the petition of the American Brake Shoe & Foundry Co., Judge Manton named receivers to manage and operate the railroads of the Interborough Rapid Transit Co., and appointed attorneys for the receivers. The receivership order was later extended to include the Manhattan Railway Co., a subsidiary of the Interborough. Thereupon Johnson, a stockholder of the Manhattan Railway Co., petitioned District Judge Woolsey to vacate Judge Manton's orders and appointments.[3] The complainant likewise sought the appointment of new receivers. Judge Woolsey, on his own initiative, consolidated the *Brake Shoe* and *Johnson* suits, and in response to the petition, signed an order setting "aside as wholly void and of no juridical effect" the appointment of receivers by Judge Manton. The operation of this order was suspended for twenty days, and the request for the appointment of new receivers was denied without prejudice, pending the outcome of an appeal by the defendants. The

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20. See also Pomerance, *op. cit. supra* note 3.

21. First National Bank v. Maine, *supra* note 9.

22. While the higher court is clearly influenced in its decision by the fact that the stock in question was *pledged* in the hands of the absent defendants, this consideration raises a problem that is entirely distinct from the matter of territorial jurisdiction, to which the above discussion is addressed. Jurisdiction of the court, through its receivers, over pledged assets of the insolvent corporation is discussed in a separate note *infra* on the same case.

1. 36 Stat. 1089 (1911), 28 U. S. C. § 22 (1926).

2. 36 Stat. 1090 (1911), 28 U. S. C. § 27 (1926).

3. The Interborough has a 999-year lease of the Manhattan Railway lines. The stockholders of the Manhattan Railway Co. saw in the Interborough receivership an attempt to abrogate this lease.

petition to vacate Judge Manton's orders assigning himself to hold a district court and to hear applications for the appointment of receivers was denied for want of jurisdiction.[4]

The technical argument supporting the legality of Judge Manton's orders is difficult to disprove. Section 18 of the Judicial Code expressly authorizes the senior circuit judge, "if the public interest requires," to "assign any circuit judge of a judicial circuit to hold a district court." [5] The determination of whether a sufficient public interest exists to warrant the exercise of this authority lies in the discretion of the senior circuit judge whose decision is not subject to judicial review.[6] A judge so appointed is invested with the duties and powers of the judges of the district,[7] among which, it can reasonably be urged, is the privilege to dissent from whatever division of business may have been previously agreed upon. Provision is made in the Judicial Code that in the event of such disagreement, the senior circuit judge "shall make all necessary orders for the division of business and the assignment of cases for trial." [8] Therefore, in passing upon the very dispute he had created, Judge Manton brought himself within the letter of the Judicial Code. He did, however, disregard a newly adopted rule of the District Court declaring that any judge designated to sit in that court "shall do such work only as may be assigned to him by the senior district judge." [9] District court rules are generally given the force of law,[10] insofar as they are consistent with the laws of the United States.[11] But in this case there is an apparent conflict between the court rule and Section 18 of the Judicial Code.[12] For it is apparent that the power of the senior circuit judge to appoint himself or any other circuit judge to sit in the district court can be effectively nullified if the judge so designated can perform only the functions assigned him by the senior district judge. Moreover, each judge has the inherent power possessed by any other judge of the same court to try any case within the jurisdiction of that court, regardless of existing rules of prac-

4. Johnson v. Manhattan Railway Co. (S. D. N. Y.) U. S. Daily, Oct. 25, 1932, at 1542.

5. *Supra* note 1.

6. See United States v. Gill, 292 Fed. 136, 137 (C. C. A. 4th, 1923); *cf.* People v. Supreme Court, 220 N. Y. 487, 116 N. E. 384 (1917).

7. *Ex parte* United States, 226 U. S. 420 (1913); Harmon v. United States, 43 Fed. 817 (C. C. Colo. 1890); Industrial & Mining Guaranty Co. v. Electrical Supply Co., 58 Fed. 732 (C. C. A. 6th, 1893); Demaris v. Barker, 33 Wash. 200, 74 Pac. 362 (1903); see 36 STAT. 1090 (1911), 28 U. S. C. § 23 (1926).

8. *Supra* note 2.

9. Rule 1(a) of General Rules of the District Court for the Southern District of New York.

10. Weil v. Neary, 278 U. S. 160 (1929); American Graphophone Co. v. National Phonograph Co., 127 Fed. 349 (C. C. N. Y. 1904); Galveston Dry Dock & Construction Co. v. Standard Dredging Co., 40 F. (2d) 442 (C. C. A. 2d, 1930); Thompson v. Hatch, 20 Mass. 512 (1826).

11. Heckers v. Fowler, 69 U. S. 123 (1864); Davidson Marble Co. v. Gibson, 213 U. S. 10 (1909); Washington-Southern Navigation Co. v. Baltimore & Philadelphia Steamboat Co., 263 U. S. 629 (1924); see Hudson v. Parker, 156 U. S. 277, 284 (1895); 1 STAT. 335 (1793), 28 U. S. C. § 731 (1926). See 6 HUGHES, FEDERAL PRACTICE JURISDICTION & PROCEDURE (1931) § 3782.

12. *Supra* note 1.

tice or agreements for the apportionment of business.[13] The violation of such rules is considered a mere irregularity and not a jurisdictional defect.[14]

There is thus an adequate basis for the conclusion that in appointing a receiver for the Interborough, Manton acted as a *de jure* judge. In any event, he acted with sufficient color of legal authority to constitute him a *de facto* judge.[15] Admittedly, in either case, the orders made by Judge Manton in the *Brake Shoe* suit could not be collaterally attacked in any other action,[16] and no authority would be vested in Judge Woolsey to vacate orders entered by Manton sitting as a judge of coordinate jurisdiction.[17] Judge Woolsey attempted to overcome this difficulty by denying that Judge Manton was either a *de jure* or *de facto* judge, and holding that he was a "usurper" whose acts were void and without effect. The only foundation for this conclusion, however, is the violation of a court rule of doubtful validity. Judge Woolsey made a further effort to acquire jurisdiction over the *Brake Shoe* case by consolidating it with the *Johnson* suit.[18] It is difficult to see how such a device could accord him the power to enter an order in one action which would affect the receivership orders made by Judge Manton in another. For it is commonly recognized that the consolidation of causes in equity is primarily a procedural expedient for convenience and economy, and does not alter the independence of the suits, or make the parties in one action parties in the other.[19]

Although Judge Manton's position may be technically unimpeachable, his exercise of power seems of doubtful propriety. The authority to designate a circuit judge to hold a district court is expressly restricted to the requirements

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13. People v. Barbera, 78 Cal. App. 277, 248 Pac. 304 (1926); White v. Superior Court, 110 Cal. 60, 42 Pac. 480 (1895); Foley v. Utterback, 196 Iowa 956, 195 N. W. 721 (1923); State v. Lichtenberg, 4 Wash. 553, 30 Pac. 659 (1892).

14. People v. Barbera; White v. Superior Court, both *supra* note 13. *Cf.* Abbott v. Brown, 241 U. S. 606 (1916); Payne v. Garth, 285 Fed. 301 (C. C. A. 8th, 1922); People v. Extraordinary Trial Term, 228 N. Y. 463, 127 N. E. 486 (1920).

15. For a comprehensive discussion of *de facto* judges see State v. Carroll, 38 Conn. 449 (1871).

16. *In re* Manning, 139 U. S. 504 (1891); Ball v. United States, 140 U. S. 118 (1891); McDowell v. United States, 159 U. S. 596 (1895); Luhrig Collieries Co. v. Interstate Coal & Dock Co., 287 Fed. 711 (C. C. A. 2d, 1923), *cert. den.* 262 U. S. 751 (1923); Hamlin v. Kassafer, 15 Ore. 456, 15 Pac. 778 (1887); see United States v. Alexander, 46 Fed. 728, 729 (D. Idaho, 1891); MECHEM, PUBLIC OFFICERS (1890) §§ 328, 330.

17. Commercial Union of America v. Anglo-South American Bank, 10 F. (2d) 937 (C. C. A. 2d, 1925); Hardy v. North Butte Mining Co., 22 F. (2d) 62 (C. C. A. 9th, 1927); Price v. Life & Casualty Insurance Co., 201 N. C. 376, 160 S. E. 367 (1931); Enderlin State Bank v. Jennings, 4 N. D. 228, 59 N. W. 1058 (1894); Warren, Wallace & Co. v. Simon, 16 S. C. 362 (1881).

18. Pursuant to 3 STAT. 21 (1813), 28 U. S. C. § 734 (1926).

19. Mutual Life Insurance Co. v. Hillmon, 145 U. S. 285 (1892); Toledo R. R. Co. v. Continental Trust Co., 95 Fed. 497 (C. C. A. 6th, 1899), *cert. den.* 176 U. S. 219 (1900); Taylor v. Logan Trust Co., 289 Fed. 51 (C. C. A. 8th, 1923); Vapor Car Heating Co. v. Gold Car Heating & Lighting Co., 296 Fed. 201 (S. D. N. Y. 1923), *cert. den.* 268 U. S. 705 (1925); see Adler v. Seaman, 266 Fed. 828, 831 (C C.. A. 8th, 1920), *cert. den.* 254 U. S. 655 (1921); 6 HUGHES, *op. cit. supra* note 11, § 3855.

of the public interest. The fact that no limitation is placed upon the discretion of the senior circuit judge as to the existence of a public interest does not warrant its promiscuous exercise. Section 18 was inserted in the Judicial Code to enable a circuit judge sitting in an action pending in the old circuit court at the time of its abolition, to continue to preside when the suit was transferred to the district court, so that a district judge would not be required to take up the unfinished cause and familiarize himself with its prior history.[20] The statute may be reasonably construed to embrace the type of public interest present when there is an accumulation of business in the district court, or where a district judge is ill or has been disqualified.[21] The motivating cause for Judge Manton's action in the instant case was the desire to prevent the impending appointment of a certain New York trust company as receivers for the Interborough.[22] It is doubtful whether Congress intended anything of that nature to constitute a real and evident public interest. Likewise, Section 23 of the Judicial Code[23] was undoubtedly designed to provide a method of breaking a real deadlock among the district judges on the agreement of business, and not to embrace a situation in which the senior circuit judge had precipitated a conflict as a preliminary to deciding it in his own favor. Moreover, Judge Manton's action in appealing to himself to adjust the dispute he had created, was inconsistent in spirit with a definite policy against permitting judges to review their own decisions.[24]

An appeal by the receivers from Judge Woolsey's decision will soon come before the Circuit Court of Appeals. That court may well decide that Judge Woolsey lacked jurisdiction to vacate the orders made by Judge Manton,[25] and that the proper procedure would have been for the plaintiff in the *Johnson* suit to intervene in the *Brake Shoe* case with his petition for the appointment of new receivers. The Court might also indicate that it would be politic for Judge Manton to find that the public interest no longer required him to hold a district court. The way would then be open for his replacement by a district judge as presiding officer of the Interborough receivership. To sustain Judge Woolsey's decision nullifying Judge Manton's appointment of receivers would be to invalidate all the orders and acts performed by the receivers in the few months they have had possession of the property of the Interborough, causing irreparable injury to the interests of innocent parties.[26] On the other hand, if new receivers are appointed on the application of an intervenor in the *Brake*

20. See Pennsylvania Steel Co. v. New York City Ry. Co., 221 Fed. 440, 442 (S. D. N. Y. 1915).

21. United States v. Gill, *supra* note 6; see Pennsylvania Steel Co. v. New York City Ry. Co., *supra* note 20, at 443; 46 Cong. Rec. 302, 304 (1910); *cf.* 36 STAT. 1089 (1911), 28 U. S. C. § 17 (1926).

22. See Judge Manton's instructions to the Interborough receivers, N. Y. L. J., Oct. 20, 1932, at 1613, 1614.

23. *Supra* note 2.

24. United States v. Lancaster, 18 U. S. 434 (1820); Moran v. Dillingham, 174 U. S. 153 (1899); Rexford v. Brunswick-Balke Co., 228 U. S. 339 (1913). See 36 STAT. 1132 (1911), 28 U. S. C. § 216 (1926).

25. *Supra* note 17.

26. *Cf.* Harkin v. Brundage, 276 U. S. 36 (1928) (a receivership action brought by fraud in a federal court was transferred to the state court on condition that the state court receivers confirmed all the acts and orders of the federal receivers); noted in (1928) 37 YALE L. J. 832.

Shoe case, they would succeed to the position of the former receivers whose acts would be given full effect.[27] But in any event the result of this judicial conflict over the power to appoint receivers and control receiverships is that the reorganization of an important utility is at a virtual standstill.

TAXATION OF RESIDENT'S INCOME EARNED OUTSIDE THE STATE

A RESIDENT of Mississippi was taxed by that state on income earned from constructing roads in Tennessee. In an action to set aside the assessment, the plaintiff challenged the constitutionality of the act imposing the tax on the ground that it deprived him of due process of law in taxing him on income earned beyond the borders of the state. In affirming a decision of the state court[1] sustaining the validity of the tax, the United States Supreme Court held that is was within the jurisdiction of Mississippi to impose the tax because of the protection afforded by that state to the recipient of the income.[2]

Under the theory that an income tax is a tax on the person, measured by the income received,[3] the jurisdiction of the domiciliary state over the recipient of the income as a resident seems sufficient to support a tax on income earned in other states. However, if the tax is considered as one on the property from which the income is derived,[4] the conventional result would be that the tax in question is invalid, since a state cannot tax tangible property located outside its borders.[5] The theory prevailing in still other jurisdictions, that an income tax is a tax on the income itself as property,[6] leaves open the question as to whether the income is properly taxable in the non-domiciliary state where it is earned, or in the domiciliary state where it is received, or in both. Finally, there is the concept of an income tax as an excise, taking the form of either a tax on the privilege of conducting income-producing activities or a tax on the privilege of receiving income.[7] Regarding the tax as coming within the former category, it would be difficult to justify a tax by the domiciliary state on privileges pursued elsewhere; but assuming that the recipient brings the money into the state of his residence, the latter alternative seems to supply a subject of

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27. Pagett v. Brooks, 140 Ala. 257, 37 So. 263 (1904); see Virginia-Carolina Chemical Co. v. Hunter, 84 S. C. 214, 224, 66 S. E. 177, 180 (1909); 1 CLARK, RECEIVERS (2d ed. 1929) § 692 (a).

1. Lawrence v. State Tax Commission, 162 Miss. 338, 137 So. 503 (1931). Another aspect of this case is discussed in Note (1932) 32 COL. L. REV. 534.

2. Lawrence v. State Tax Commission, 286 U. S. 276 (1932). The court also held that the exemption of corporations from a similar tax did not deprive plaintiff of the equal protection of the laws. The issue involved therein is beyond the scope of this note.

3. Crescent Manufacturing Co. v. Tax Commission, 129 S. C. 480, 485, 124 S. E. 761, 762 (1924).

4. Opinion of the Justices, 220 Mass. 613, 624, 108 N. E. 570, 574 (1915).

5. Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194 (1905); Frick v. Pennsylvania, 268 U. S. 473, 488 (1925). The extent of this doctrine is discussed in Harper, *Jurisdiction of the States to Tax—Recent Developments* (1930) 5 IND. L. J. 507, 510.

6. State v. Pinder, 30 Del. 416, 422, 108 Atl. 43, 46 (1919); Eliasberg Bros. Mercantile Co. v. Grimes, 204 Ala. 492, 499, 86 So. 56, 62 (1920).

7. Hattiesberg Grocery Co. v. Robertson, 126 Miss. 34, 88 So. 4 (1921).

taxation by the domiciliary state. In the instant case, the Supreme Court rejects a consideration of the various theories as a basis for deciding the constitutional issue, and establishes domicile as the test of validity. This formula obviates the confusion resulting from reliance upon the definitions and interpretations placed upon local income tax statutes by the state courts.

Since it was established in *Shaffer v. Carter*[8] that a state may tax income earned by non-residents within its borders, there exists the possibility of subjecting the recipient to double taxation. A full exercise by all the states of their power to tax, as sanctioned by the Court in the instant case and in the *Shaffer* case, would produce double taxation in every instance where a person or corporation does business in a non-domiciliary state. Although not in itself unconstitutional, double taxation is regarded as extremely undesirable.[9] In the principal case, however, Tennessee imposed no tax on the plaintiff's income. Therefore, to hold the Mississippi tax invalid would relieve the plaintiff of paying a tax in either state. But such a situation can obtain only as long as states refrain from exercising their constitutional powers of taxation. Were these powers uniformly exercised in their fullest degree, the problem of double taxation would become acute.

The possible result of the present decision suggests the wisdom of remedial legislation.[10] The United States has recognized the existence of international double taxation, and in taxing citizens and domestic corporations on income earned from all sources, allows certain credits for taxes paid to foreign governments, or possessions of the United States.[11] New York alleviates the burden of double taxation by permitting deductions from taxes payable to the state by non-residents on income earned within the state, amounting to such proportion of the tax paid to the domiciliary state as the income earned in New York bears to the total income; such credits are allowed, however, only in cases where the other state grants substantially similar credits to New York residents.[12] Adoption in all the states of the method employed by the federal government would result in taxation at the source of the income,[13] whereas reciprocal arrangements in all the states embracing the New York rule would confine taxation to the domiciliary state.[14] Both methods appear equally effective, but the probable reluctance of the states to forego taxation powers sanctioned by the Supreme Court minimizes the possibility of uniform acceptance of either approach to the problem.

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8. Shaffer v. Carter, 252 U. S. 37 (1920).

9. Kidd v. Alabama, 188 U. S. 730 (1903).

10. Legislative efforts by the various nations to mitigate the hardships of international double taxation are set forth in HERNDON, RELIEF FROM INTERNATIONAL INCOME TAXATION (1932) c. 10.

11. 45 STAT. 829 (1928), 26 U. S. C. SUPP. 1 § 2131a (1928). The operation of this section is illustrated in HERNDON, *op. cit. supra* note 10, c. 14 § 8.

12. N. Y. TAX LAW (1921) § 363.

13. For the view that the non-domiciliary state should be given the power to tax, see Rottschaeffer, *State Jurisdiction of Income for Tax Purposes* (1931) 44 HARV. L. REV. 1075, 1099.

14. For the view that the domiciliary state should be given the power to tax, see Kessler, *Some Legal Problems in State Personal Income Taxation* (1925) 34 YALE L. J. 863, 878.

CONSTRUCTIVE SERVICE ON NON-RESIDENT DEFENDANT IN SUIT TO REFORM LIFE INSURANCE POLICY

SUITS for the reformation of written instruments are generally held to require personal service on a non-resident defendant,[1] upon the theory that such actions directly affect his substantive rights.[2] However, exceptions to this rule are found in actions concerning the status of land, such as suits for the reformation of deeds,[3] acknowledgments of deeds,[4] and of contracts for the sale of land.[5] These proceedings, like actions to remove a cloud to title,[6] to set aside a deed for fraud,[7] and to foreclose a mortgage on land,[8] are said to permit constructive service on a non-resident defendant since the status of land, which is within the jurisdiction of the court, is primarily in issue.[9] Constructive service on a non-resident is also allowed in suits for the reformation of written instruments not concerned with land when there is a *res* within the court's jurisdiction, and the substantive rights of the defendant are considered not to be directly affected.[10]

In *Cameron v. Pennsylvania Mutual Life Insurance Company*,[11] a bill was brought in the New Jersey Court of Chancery to reform an insurance policy by substituting the plaintiff as beneficiary. At the time of the action, the insured having died, an interpleader suit to determine the rights of the claimants to the proceeds of the policy was pending in the federal court in Pennsylvania. The New Jersey court in the reformation suit allowed service by publication on the non-resident designated beneficiary, partially on the ground that the policy itself, being in the state, constituted the essential *res* which accorded the court jurisdiction over the defendant. By this reasoning, the court distinguished the earlier case of *McBride v. Garland*[12] in which a suit to reform an insurance policy and to direct payment of the proceeds to the plaintiff was held to require personal service, since the policy, or *res*, was not within the court's jurisdiction.

A further ground for allowing constructive service on the non-resident defendant in the principal case was based on the fact that her substantive rights would not be materially affected. The court concluded that a decree reforming the insurance policy would merely determine its form, and would not be dispositive of the defendant's rights thereunder; that claim would be disposed of in the

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1. Bethell v. Bethell, 92 Ind. 318 (1883); McBride v. Garland, 89 N. J. Eq. 314, 104 Atl. 435 (1918); Rosenbaum v. Evans, 63 Wash. 506, 115 Pac. 1054 (1911).

2. When personal rights are in issue, the action is *in personam*. Pennoyer v. Neff, 95 U. S. 714 (1887).

3. Corson v. Shoemaker, 55 Minn. 386, 57 N. W. 134 (1893).

4. Veeder v. Gilmer, 47 Tex. Civ. App. 464, 105 S. W. 331 (1907).

5. Robbins v. Martin, 43 La. Ann. 488, 9 So. 108 (1891).

6. Arndt v. Griggs, 134 U. S. 316 (1890).

7. Adams v. Cowles, 95 Mo. 501, 8 S. W. 711 (1888).

8. Crombie v. Little, 47 Minn. 581, 50 N. W. 823 (1891).

9. When the status of land is in issue, the action is *in rem*. Dillon v. Heller, 39 Kan. 599, 18 Pac. 693 (1888).

10. Doepke v. The Christy Box Car Loader Co., 14 Ohio N. P. 523 (N. S. 1913) (promissory note). Perry v. Young, 133 Tenn. 522, 182 S. W. 577 (1916) (assignment of insurance policy). Such actions are said to be *quasi in rem*.

11. 161 Atl. 55 (N. J. Eq. 1932).

12. *Supra* note 1.

pending interpleader suit, in which the reformed policy would be evidential.[13] The court maintained further that if the contract was as alleged in the bill, a reformation of the policy would not deprive the defendant of any property right since in that event she would not have had such a right. But in determining that "the contract was as alleged in the bill," the court would actually deprive the defendant of a property right, since it would pass judgment on the operative facts which might have sustained her personal claim to the proceeds of the policy. Should the Pennsylvania court, in determining the rights of the claimants in the interpleader suit, accord "full faith and credit" to a decree of the New Jersey court reforming the policy, that decree would be *res adjudicata* as to the facts determinative of the reformation.

If the principal case is followed, a non-resident having an interest in the obligation of insurance will be forced to appear upon mere constructive service in an action to reform a policy brought in any state where the insurance company does business and has agents.[14] A defense in such a case might be found in the doctrine of *forum non conveniens*, which deals with the discretionary power of a court to decline to exercise a possessed jurisdiction whenever it appears that the cause before it may be more appropriately tried elsewhere.[15] But without this possible restraint, a bill to reform an insurance policy might be brought by the holder thereof in any state where jurisdiction over the insurance company could be obtained, regardless of the possible expense and inconvenience to an alleged beneficiary of the insurance fund.

Statutory Presumptions of Negligence in the Conflict of Laws

The familiar conflict of laws doctrine that in the field of torts the *lex loci* governs rules of substantive law, the *lex fori* rules of procedure, frequently makes necessary a difficult distinction between substantive law and procedure.[1] This distinction has recently been made solely by a consideration of nomenclature. In *Davis Cabs, Inc., v. Evans*[2] the plaintiff was injured in Kentucky while riding in the defendant's taxicab. Suit was brought in Ohio. A Kentucky statute provided that the operation of a vehicle in the residence portion of any city in excess of twenty miles per hour constituted *prima facie* evidence of unreasonable and improper driving.[3] Under an Ohio statute[4] the same facts constituted negligence *per se*.[5] In its charge to the jury, the lower court applied the Kentucky statute and a verdict was found for the plaintiff. On appeal, the court accepted the defendant's contention that the Kentucky statute was

13. See Abraham v. North German Fire Insurance Co., 37 Fed. 731, 732 (N. D. Iowa 1889).

14. See Perry v. Young, *supra* note 3, at 541, 182 S. W. at 582.

15. The constitutionality of this doctrine has been upheld in Douglas v. New York, New Haven and Hartford Rr. Co., 279 U. S. 377 (1929).

1. For an argument that the distinction is only in attitude see Arnold, *The Rôle of Substantive Law and Procedure in the Legal Process* (1932) 45 Harv. L. Rev. 617, at 642.

2. 182 N. E. 327 (Ohio 1932).

3. Ky Stat. (Carroll, 1930) § 2739 g-51.

4. Ohio Gen. Code (Page, 1931) § 12603.

5. See Chesrown v. Bevier, 101 Ohio St. 282, 128 N. E. 94 (1920).

inapplicable but concluded that the Ohio statute was applicable, and accordingly affirmed the judgment on the ground of non-prejudicial error. The court reasoned that both statutes were remedial since they prescribed rules of "evidence," and hence the *lex fori* governed.

The court's rationale seems to regard only a nominal classification of presumptions and overlooks the fact that they perform various functions.[6] A presumption that merely shifts to the defendant the burden of going forward with the evidence, of course, performs the function of compelling the defendant to introduce evidence, and then vanishes.[7] However, if from the existence of facts A and B the existence of fact C will be presumed, the presumption seems clearly more than a mere rule of evidence to the extent that the existence of fact C does not follow as a reasonable inference from the existence of facts A and B.[8] When it is held that driving without a license constitutes negligence *per se*, unquestionably no reasonable inference that the driver was negligent on the particular occasion arises solely from the fact that he did not have a license. The presumption performs the function of adding to the criminal liability prescribed for violation of the statute an enlargement of the defendant's civil liability. If it is held that the presumption is sufficient to take the plaintiff's case to the jury without any evidence of negligence, the increased liability, though less enlarged, is no less obvious.[9] And if the existence of fact C will be conclusively presumed from the existence of facts A and B, the presumption enlarges liability even if the existence of fact C follows as a reasonable inference, since the defendant is denied the opportunity of proving that fact C actually did not exist.[10] In the principal case, under the above analysis, the lower court's application of the Kentucky statute seems correct. The presumption established by the statute clearly does not follow as a reasonable inference from the facts and hence, to the degree that it does not do so, is substantive in nature. Since the presumption apparently constituted evidence for the plaintiff to be considered by the jury, the defendant's liability for violation of the statute was substantially enlarged. The conclusive presumption of the Ohio statute, of course, enlarged liability to an even greater degree.[11]

Obviously this analysis provides no "rule of thumb" to determine whether a presumption is remedial or substantive. In each case the court would have to consider first, whether the presumption followed as a reasonable inference from the facts, and secondly, its effect. While this method concededly would place

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6. See Bohlen, *Rebuttable Presumptions of Law* (1920) 68 U. OF PA. L. REV. 307, at 319.

7. According to Bohlen, this is the only form of presumption that is a true rule of evidence. *Supra* note 6, at 307.

8. See THAYER, PRELIMINARY TREATISE ON EVIDENCE (1898) 315-327; 2 CHAMBERLAYNE, MODERN LAW OF EVIDENCE (1911) §§ 1085-1087.

9. THAYER, *op. cit. supra* note 8, at 331.

10. Text writers agree that a conclusive presumption must be classed as a rule of substantive law and has no place in the law of evidence. 5 WIGMORE, EVIDENCE (1923) § 2492; THAYER, *op. cit. supra* note 8, at 318. And see Bohlen, *supra* note 6, at 311. See also CONFLICT OF LAWS RESTATEMENT (Proposed Final Draft No. 2, 1931) § 647.

11. It has been held that a conclusive presumption of the place of the tort must be applied in the place of the forum. Interstate Motor Freight Co. v. Johnson, 32 Ohio 363, 168 N. E. 143 (1929). See (1929) 78 U. OF PA. L. REV. 421. See also Comment (1927) 12 MINN. L. REV. 263, at 271.

a slight burden on the trial judge, it would protect the defendant from the exercise of any opportunity the plaintiff might otherwise have to select a forum with a presumption more favorable to his cause than that of the *loci delicti*. At the same time the plaintiff would be assured that by reason of the necessity of obtaining jurisdiction over the defendant, he would not be compelled to sue in a forum with a presumption less favorable. From the viewpoint of logic and comity the method seems preferable to the appellate court's categorical classification of presumptions as remedial.[12]

POWER OF NON-JUDGMENT CREDITOR TO SET ASIDE FRAUDULENT CONVEYANCE

IN *Braun v. American Laundry Machinery Co.*,[1] the plaintiff, an unsecured, non-judgment creditor of a corporation which had entered into equity receivership in the Federal Court for the Northern District of New York, brought an action in equity in the Federal Court for the Southern District of New York against the defendant as the fraudulent vendee of the debtor corporation. Alleging that the defendant had purchased goods from the debtor corporation in violation of the New York Bulk Sales Act,[2] the plaintiff prayed that the sale be declared void as to the creditors represented by the bill, and that the defendant be enjoined from further disposing of the property and be held accountable therefor.[3] The defendant's motion to dismiss was granted on the grounds that the plaintiff had failed to aver a judgment and the return of execution against the debtor, and that the elimination by state statute of these prerequisites to equity jurisdiction was a mere procedural alteration without effect in a Federal Court. This decision repeats the established Federal rule.[4]

The common law doctrine denied a non-judgment creditor the power to set aside a fraudulent conveyance[5] because, under a separate system of law and equity, a single action in equity to establish the creditor's claim and set aside the conveyance would have deprived the debtor of his constitutional right to a jury trial on the legal issue of the debt.[6] A separate action in equity to set aside the fraudulent conveyance pending determination of the legal issue of the validity of the debt alleged was also forbidden, because it was considered

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12. See Comment (1930) 43 HARV. L. REV. 1134, where a contrary view is urged. The American Law Institute has apparently adopted the doctrine of the principal case, except as to conclusive presumptions. CONFLICT OF LAWS RESTATEMENT, *supra* note 10.

1. Braun v. American Laundry Machinery Co., 56 F. (2d) 197 (S. D. N. Y. 1932).

2. N. Y. PERS. PROP. LAW (McKinney, 1917) § 44.

3. *Id.* par. 3.

4. Scott v. Neely, 140 U. S. 106 (1891); Cates v. Allen, 149 U. S. 451 (1893); Hollins v. Brierfield Coal Co., 150 U. S. 371 (1893); *cf.* Pusey & Jones Co. v. Hanssen, 261 U. S. 491 (1923).

5. Cates v. Allen, 149 U. S. 451 (1893); Whitney v. Davis, 148 N. Y. 256, 42 N. E. 661 (1896); GLENN, THE LAW OF FRAUDULENT CONVEYANCES (1931) § 90.

6. See Scott v. Neely, 140 U. S. 106, 109 (1891); Cates v. Allen, 149 U. S. 451, 459 (1893); Goldman Commission Co. v. Williams, 211 Fed. 530, 533 (W. D. Ark. 1914).

undesirable to allow a creditor with an unproven claim to tie up his alleged debtor's property.[7]

Although this doctrine still represents the majority rule, there has been a tendency to eliminate judgment as a prerequisite to equitable aid.[8] The blending of law and equity has made it possible to have a jury trial for the legal issue of the debt and to set aside the conveyance in one action; [9] and a change of policy has favored the removal of all obstacles to speedy recovery for creditors.[10] The Uniform Fraudulent Conveyance Act, which has been adopted in sixteen states,[11] has been interpreted as an abrogation of the necessity of judgment.[12] The rationalization of the Federal Court's refusal to follow state policies in granting a non-judgment creditor the right to set aside a fraudulent conveyance is that such a right is procedural rather than substantive, and therefore not enforceable in the Federal courts.[13] However, where the fraudulent transfer takes place in a state which has abrogated the common law rule, and where all the parties concerned are doing business within that state, but where the fraud-

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7. Tate v. Liggat, 2 Leigh (29 Va.) 84, 99 (1830); see Shufeldt v. Boehm, 96 Ill. 560, 564 (1880); Note (1910) 23 L. R. A. (N. S.) 1, 10.

8. By interpretation of statute: Douglass Cotton Oil Co. v. Alabama Machinery & Supply Co., 205 Ala. 51, 87 So. 342 (1920); Smith v. Arkadelphia Milling Co., 143 Ark. 214, 220 S. W. 49 (1920); McBride v. Adams, 70 Miss. 716, 12 So. 699 (1893) (statute specifically granted equity jurisdiction to non-judgment creditor); Citizens' National Bank v. Watkins, 126 Tenn. 453, 150 S. W. 96 (1912); *cf.* Meinhard v. Youngblood, 37 S. C. 231, 15 S. E. 950 (1892) (the court drew a distinction between "moral" and constructive fraud, allowing a non-judgment creditor a right of action only in case of moral fraud); Williams v. Davenport, 181 Ky. 496, 205 S. W. 551 (1918) (statute relating to the conveyance of real property); see First National Bank v. McDonough, 19 Ariz. 223, 168 Pac. 635 (1917); Wood v. Lester, 126 Va. 169, 101 S. E. 52 (1919).

9. First National Bank v. McDonough, *supra* note 8 (if the debt action fails, the action to set aside the fraudulent transfer necessarily fails too); Vail v. Hammond, 60 Conn. 374, 22 Atl. 954 (1891); De Lacy v. Hurst, 83 Ga. 223, 9 S. E. 1052 (1889); Simonton v. Simonton, 33 Idaho 255, 193 Pac. 386 (1920); Shirley v. Waco Tap Ry. Co., 78 Tex. 131, 10 S. W. 543 (1889).

10. See American Surety Co. v. Conner, 251 N. Y. 1, 7, 166 N. E. 783, 785 (1929). For a discussion of Mr. Justice Cardozo's opinion in this case, see Glenn, *The Uniform Fraudulent Conveyance Act; Rights of Creditor Without Judgment* (1930) 30 COL. L. REV. 202.

11. See 9 U. L. A. 168 (1932).

12. Lipskey v. Voloshen, 155 Md. 139, 141 Atl. 402 (1928); American Surety Co. v. Conner, *supra* note 10; *cf.* Morse v. Roach, 229 Mich. 538, 201 N. W. 471 (1924). *Contra:* Gross v. Pennsylvania Mortgage & Loan Co., 146 Atl. 328 (N. J. 1929) (where the statute was declared unconstitutional "to the extent that it attempts to give the Court of Chancery authority to hear and determine actions for debt and for damages arising out of a breach of contract, which power is solely within the jurisdiction of the law courts." Law and Equity are separated by the New Jersey Constitution, Article VI, section 1; *cf.* Lipman v. Manger, 185 Wis. 63, 200 N. W. 663 (1924) (where the Uniform Fraudulent Conveyance Act although adopted by this state was not even referred to and therefore not construed).

13. See Hollins v. Brierfield Coal Co., 150 U. S. 371, 379 (1893); Pusey & Jones v. Hanssen, 261 U. S. 491, 497 (1923).

ulent transferee can be sued in the federal courts because of diversity of citizenship, the application of the Federal rule seems an unfortunate contradiction of state policy.[14]

In the principal case the plaintiff relied on the fact that the debtor had entered into equity receivership as sufficient justification for not having reduced his claim to judgment. On the other hand, the defendant contended that the debtor's receiver, rather than the plaintiff, was the proper party to set aside the fraudulent transfer. In answer to the plaintiff's argument, the court declared that even though the debtor was in the hands of the receiver, the plaintiff still had a legal remedy either by filing his claim with the receiver, or by asking the receivership court to allow a special action against the insolvent debtor to acquire a judgment solely for the purpose of setting aside the fraudulent conveyance.

Although not necessary to the decision, the court expressed the opinion that the receiver could not have maintained this action. While it is generally established that the receiver of a corporation has no greater rights than those possessed by the corporation itself, and any defense which would have been good against the corporation may be maintained against its receiver, it is also held that the receiver of an insolvent corporation may, in the interest of its creditors, disaffirm transactions of the insolvent in fraud of its creditors where the corporation could not.[15] Whether or not the receiver may so disaffirm depends upon the purpose of the receivership and the nature of the proceedings leading to the appointment.[16] Where, for example, the appointment is merely in aid of a mortgage foreclosure, then the receiver has an interest only in the mortgaged property and has no power to disaffirm the acts of the debtor or to set aside conveyances which do not affect such property.[17] Where there is no showing of insolvency, a court cannot order a temporary receiver to disaffirm the acts of the debtor.[18] But where a receiver takes over an insolvent corporation for the purpose of winding up its affairs he may clearly disaffirm trans-

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14. The New York Bulk Sales Act under which the instant case was brought provides that a sale of goods in bulk not complying with the provisions of the act shall be voidable by any creditors of the vendor. This has been interpreted as including non-judgment creditors. Willi v. Lyon, 131 Misc. 73, 226 N. Y. Supp. 283 (1928); *In re* Perman, 172 App. Div. 14, 157 N. Y. Supp. 971 (1st Dep't 1916); Touris v. Karantzalis, 170 App. Div. 42, 156 N. Y. S. 526 (1st Dep't 1915). In view of the Court of Appeals interpretation of similar paragraphs of the Uniform Fraudulent Conveyance Act, N. Y. DEBTOR and CREDITOR LAW §§ 270, 278, 279, in the American Surety Case, *supra* note 10, as abrogating the common law rule requiring judgment, the instant case appears in conflict with state policy.

15. *In re* Wilcox & Howe Co., 70 Conn. 220, 39 Atl. 163 (1898); Curtis v. Leavitt, 15 N. Y. 9 (1853); Pittsburgh Carbon Co. v. McMillin, 119 N. Y. 46 (1890).

16. Duplex Printing Press Co. v. Clipper Publishing Co., 213 Pa. St. 207, 62 Atl. 841 (1906); Porter Co. v. Boyd, 171 Fed. 305 (C. C. A. 3d, 1909).

17. A. B. Leach & Co., Inc. v. Grant, 27 F. (2d) 201 (C. C. A. 6th, 1928); see Smith v. McCullough, 104 U. S. 25 (1881).

18. A. B. Leach & Co., Inc. v. Grant, *supra* note 17. The receiver may ask for a further adjudication of the court to prove insolvency. Sullivan Machinery Co. v. Griffith, 294 Pa. 422, 144 Atl. 421 (1928).

actions in fraud of creditors,[19] his power under such circumstances depending upon that of the creditors. There may arise the further complication that the receiver represents general creditors who cannot attack the validity of the debtor's conveyances without judgment and return of execution or levy of attachment.[20] The receivership, of course, has suspended their rights to acquire judgments and levy attachments. In this situation, the receiver may set aside the conveyances on the theories that where the law prevents the creditor from helping himself, it will enforce his rights for him through his agent,[21] and that a receiver has the powers of an attaching creditor, even though the creditors he represents have sued out no process.[22] Where it is held that a conditional sale contract can be attacked only by judgment creditors, the creditors having actions pending at the time of the receiver's appointment might enter judgments and the receiver would then succeed to their rights.[23] In the case of a mortgage on the insolvent's property, if the mortgage is invalid as to some creditors represented by the receiver but not as to others, the receiver cannot bring proceedings against the mortgagee to cancel the mortgage.[24] Such an action, for the benefit of only a few creditors, might be a great expense to the estate of the insolvent, and the cancellation of the mortgage would deprive the mortgagee of a lien on the debtor's property which should have preference over those creditors as to whom the mortgage was perfectly valid.[25] However, the receiver may sell the mortgaged property free from all liens and transfer to this fund the claims of the mortgagee and such creditors as to whom the mortgage is invalid.[26]

Thus the receiver of an insolvent corporation can apparently avoid a conveyance or disaffirm an act of the insolvent only if such act is voidable as to all the creditors represented by him.[27] In this respect, the receiver of the insolvent corporation differs from a trustee in bankruptcy, who may set aside a transaction of the bankrupt which was fraudulent only as to part of the creditors.[28] But in such cases, under the Bankruptcy Act,[29] all creditors share alike in the recovered assets without the accordance of preferences to those creditors as to whom the conveyance or transaction was fraudulent.[30]

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19. *In re* Wilcox & Co., *supra* note 15.

20. *Id.* at 232, 39 Atl. at 167.

21. *Ibid.*

22. Porter Co. v. Boyd, 171 Fed. 305 (C. C. A. 3d, 1909); Smith v. Orr, 224 Fed. 71 (C. C. A. 8th, 1915); Brockhurst v. Cox, 71 N. J. Eq. 703, 64 Atl. 182 (1906).

23. See Rapoport v. Rapoport Express Co., 90 N. J. Eq. 519, 523, 107 Atl. 822, 824 (1919).

24. American Trust & Savings Bank v. McGettigan, 152 Ind. 582, 52 N. E. 793 (1899).

25. *Id.* at 589, 52 N. E. at 796.

26. *Id.* at 590, 52 N. E. at 796.

27. *Cf.* Farnsworth v. Wood, 91 N. Y. 308, (1883).

28. Mott v. Reeves, 125 Misc. 511, 211 N. Y. Supp. 375 (1925), *aff'd* without opinion, 217 App. Div. 718, 215 N. Y. Supp. 889 (4th Dep't 1926), *aff'd* without opinion, 246 N. Y. 567, 159 N. E. 654 (1927); Costello v. Emmick, 122 Misc. 114, 203 N. Y. Supp. 123 (1923).

29. 30 STAT. 565 (1898) 11 U. S. C. § 110(e).

30. Moore v. Bay, 284 U. S. 4 (1931); *In re* Moore, 11 F. (2d) 62 (C. C. A. 4th, 1926).

In the instant case, the sale by the debtor corporation to the defendant was voidable only as to those creditors whose claims had accrued before the date of the sale.[31] Consequently, if the plaintiff had filed his claim with the receiver, the latter could not have maintained an action in his behalf unless all the creditors represented by him had claims accruing before the date of sale.

31. Apex Leasing Co., Inc., v. Litke, 173 App. Div. 323, 159 N. Y. Supp. 707 (1st Dep't 1916), *aff'd* without opinion, 225 N. Y. 625, 121 N. E. 853 (1918).